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No. 95-1693

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

VICTOR PORTILLO AND RANCHO SIERRA CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

LAWRENCE S. ROBBINS
Counsel of Record
ALAN E. UNTEREINER
LAURIE R. RUBENSTEIN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

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REPLY BRIEF FOR PETITIONERS

This Court's decisions make clear that, regardless of the reasons why a party violates a discovery order, "there are constitutional limitations upon the power of courts, *even in aid of their own valid processes*, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 209 (1958) (emphasis added). An unbroken line of this Court's cases interpreting Federal Rule of Civil Procedure 37 and the Due Process Clause of the Fifth Amendment to the U.S. Constitution thus forbids lower courts to impose the draconian sanction of dismissal "'as a mere punishment'" for a party's refusal to comply with a discovery order. See, *e.g.*, *id.* at 210, quoting *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 350 (1909). Instead, courts may bar a party from pursuing his claim as a result of a discovery violation only if there is a close nexus between the offending conduct and the claim that is dismissed (or the issues raised by that claim). See, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *Hammond Packing*, 212 U.S. at 351. The rationale for that limitation is straightforward: the due process right to be heard (which Rule 37 incorporates) is satisfied if, but only if, a refusal to produce evidence may be presumed to be an admission of a claim's or defense's lack of merit. Pet. 9.

That principle of due process and of Rule 37 was violated in this case when the district court ordered the outright dismissal of petitioners' claims to their property as a penalty for petitioner Portillo's failure to appear for a deposition, even though petitioners offered to admit every allegation of the government's complaint and sought merely to challenge the size of the forfeiture as grossly excessive under the Eighth Amendment. See *Austin* v. *United States*, 509 U.S. 602 (1993). In response to our petition, the government offers only a recasting of the precise arguments this Court rejected in the decisions cited above: that because petitioner Portillo refused to obey a discovery order, the district court was authorized to mete out any punishment, regardless of the relationship between the unavailable discovery and the issues remaining in the case. Because that argument is so plainly

incompatible with this Court's precedents, the Court should summarily reverse the decision below. In the alternative, the Court should grant plenary review or, at a minimum, grant the petition, vacate the decision below, and remand with instructions to the court of appeals to reconsider its decision in light of *Degen* v. *United States*, No. 95-173 (U.S. June 10, 1996), which casts further doubt upon the Ninth Circuit's analysis.

1. Far from supporting the decision below, as the government argues (Br. in Opp. 7-8), this Court's recent decision in *Degen*, which *unanimously reversed* a decision of the Ninth Circuit upholding the dismissal of a property owner's claim in a civil forfeiture action, in fact further confirms the Ninth Circuit's error in this case. According to the government, *Degen* "expressly reaffirmed the district court's traditional authority to sanction absent forfeiture claimants on the basis of discovery abuse in the civil forfeiture proceeding itself — including * * * the sanction of 'dismissal in an appropriate case.'" Br. in Opp. 7 (quoting *Degen*, slip op. 7). While we agree with the government that *Degen* is directly relevant to this case, we submit that the government misapprehends the import of the Court's decision in that case.

In *Degen*, this Court unanimously held that a district court may not, in the exercise of its inherent powers, sanction a property owner by dismissing his claim in a civil forfeiture action merely because he fails to return to the United States to face charges in a separate criminal action. That sanction, the Court explained, is "most severe," "excessive," and, in the end, simply "too rough." Slip op. 9. What is more, the Court expressly cautioned — in words that have direct applicability here — that "too free a recourse to rules foreclosing consideration of claims on the merits" would "erode[]" the very dignitary purposes justifying the imposition of sanctions in the first place. *Ibid*. Because the Court held that the "disentitlement doctrine" does not authorize a sanction in these circumstances, it had no occasion to decide whether such a sanction would violate due process. But the Court did take pains to acknowledge the fundamental "right of a citizen to defend his property against attack in a court" (slip op. 8), and its decision to limit the disentitlement doctrine plainly was animated by concerns over the due-process implications of a contrary holding.

The government is mistaken in suggesting that the Court's analysis demonstrates the correctness of the Ninth Circuit's decision in this case. On the contrary, this Court in *Degen* was careful to note that a federal court may impose the sanction of dismissal for violation of a discovery order, but only "*in an appropriate case*." Slip op. 7 (emphasis added). As the Solicitor General is well aware, that carefully chosen qualification reflects a lively debate during the oral argument of precisely the issue presented in this case — whether a district court may dismiss the claim of a property owner who resides abroad for failing to comply with a court order requiring that he travel to the United States for a deposition.

> Court: * * * I thought you were not contesting that as far as the forfeiture is concerned Mr. Degen would have to be treated like any other litigant, *so if he didn't show up, say, for a deposition,* didn't comply with all the discovery requirements, *out he goes*. * * *
>
> Counsel for Degen: Well, we are certainly not suggesting, Justice Ginsburg, that he has some special advantage by being — by virtue of his nonappearance, and so, for example, if there were an *appropriate* sanction for nonappearance in the forfeiture action, I suppose that *if that sanction otherwise comported with the two standards that this Court articulated in Insurance Corporation of Ireland*, I suppose he could be appropriately sanctioned * * *
>
> Court: But as to the forfeiture proceeding, he would have to comply with all the requirements the court would impose on anyone who's contesting a forfeiture.
>
> Counsel for Degen: That's absolutely correct, and the only point of departure that I thought I tried to suggest to Your Honor's question is — *insofar as the predicate is that if he didn't show up for a deposition he would be automatically subject to have his claim dismissed*, I'm not altogether sure that courts can dismiss claims whenever there's any particular violation of a discovery order.

No. 95-173 Oral Arg. Tr. 7-9 (emphasis added).[1]

This case squarely presents the question alluded to in the foregoing exchanges during the *Degen* oral argument: May a district court, consistent with Rule 37 and the Due Process Clause of the Fifth Amendment, impose the ultimate sanction of dismissal on a property owner even when the owner offers to admit every allegation in the government's complaint and seeks to litigate only a constitutional claim as to which discovery is unnecessary — here, whether the forfeiture sought by the government is excessive under the Eighth Amendment? Or, to use the language of *Degen*, is this an "appropriate case" (slip op. 7) in which the sanction of dismissal may be imposed, consistent with Rule 37 and due process?

The Court's opinion in *Degen* strongly suggests that it is not. As previously explained, the Court's opinion instructs that "too free a recourse to rules foreclosing consideration of claims on the merits" will "erode[]" the very dignitary purposes justifying the imposition of sanctions. Slip op. 9. In addition to urging caution in the use of the ultimate sanction of dismissal, the Court explained that "[c]onsideration of some of Degen's defenses, such as the statute of limitations, appears to require little discovery" and that if those defenses "have merit, the Government should not prevail." *Id.* at 8. In this case as well, petitioners' constitutional challenge to the magnitude of the forfeiture does not require factual development or discovery; and if he is correct about those claims, the government should not be permitted to extract a punishment that violates the Eighth Amendment. Finally, this Court's decision in *Degen* rests on the principle that dismissal is improper where there is no nexus between the offending conduct and claim that is dismissed. That principle is controlling here as well. Thus, *Degen* strongly supports our request for summary reversal.

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[1] See also *id.* at 12 (in response to question whether district court could exercise discretion to order absent claimant to appear for deposition, counsel for Degen noted that this would raise a "further question * * * as to whether the violation of that order gives — justifies the sanction, the dispositive sanction of dismissal").

In any event, this Court need not, at this juncture, resolve our disagreement with the Solicitor General over the proper interpretation of *Degen*. In view of the conceded relevance of *Degen*, this Court should, at the very least, follow its usual practice of granting the petition, vacating, and remanding to the Ninth Circuit for reconsideration in light of *Degen*.

2. The government also suggests (Br. in Opp. 6) that the failure of petitioners' papers below to expressly refer to "due process" precludes this Court from considering their constitutional arguments here. But petitioners plainly — and explicitly — grounded their brief to the Ninth Circuit in Rule 37, which, as this Court repeatedly has recognized, "itself embodies the standard established in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), for the due process limits on such rules." *Insurance Corp. of Ireland*, 456 U.S. at 705. See also *id.* at 707 (Rule 37(b)(2)'s requirement that any sanction be "just" represents "the general due process restrictions on the court's discretion"); *Societe Internationale*, 357 U.S. at 209 (Rule 37 must "be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law"); Fed. R. Civ. P. 37 advisory committee's note (1937) (noting that Rule 37's sanction provisions "are in accord" with the holdings of *Hammond Packing* and *Hovey* v. *Elliott*, 167 U.S. 409 (1897)).

Indeed, petitioners not only specifically premised their argument upon Rule 37 (see Pet. C.A. Br. 11), but they made the precise argument we advance here: that because Mr. Portillo's deposition would not shed any light on the issues remaining in the litigation, Rule 37 precluded the district court from dismissing petitioners' claims as a discovery sanction (see *id.* at 26 ("The deposition of Claimant Victor Portillo being irrelevant to any issue in dispute, the District Court should have held a hearing on the issue of whether ordering all of the defendant properties forfeited to the Government was an excessive penalty under the Eighth Amendment to the United States Constitution.")). Thus, although it is true that petitioners here have provided this Court with more citations and argument than they did below, the petition nevertheless addresses exactly the same issues that were briefed in the Ninth Circuit: whether Rule 37 — with its basis in due process

concerns — forbade the district court to do what it did. Petitioners did not waive any argument advanced by the petition.

3. When it comes to the question presented by our petition — whether the district court has the authority under Rule 37, consistent with the Due Process Clause, to impose the dismissal sanction on petitioners under the circumstances of this case — the government has nothing convincing to say. Not surprisingly, it does not *openly* dispute our basic claim that Rule 37 and the Due Process Clause prohibit district courts from imposing the sanction of dismissal for a discovery violation unless a close nexus exists between the offending conduct and the claim that is dismissed (or the issues raised by that claim). Its argument, however, nonetheless amounts to an outright denial of that settled principle. After all, petitioners willingly conceded *every factual allegation* raised in the government's complaint — the document that must provide the basis of any nexus the government claims exists here. See Br. in Opp. 10 ("the government sought discovery relevant to its own claim that petitioners' properties were forfeitable in their entirety and petitioner Portillo willfully refused to comply with a valid discovery order"). The government's argument thus boils down to a submission that the decision below was correct, not because Mr. Portillo's failure to appear for a deposition may serve as a proxy for his (and Rancho Sierra's) admission of disputed fact issues (there were no disputed fact issues), but rather merely to punish petitioners for Mr. Portillo's failure to be deposed. But, as this Court has emphasized again and again, that is simply not something courts may do. *See* Pet. 10-12 and cases cited therein.[2]

In its only concession to addressing the real issue before the Court, the government maintains in a footnote that had the district

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[2] The Solicitor General mistakenly states that the Ninth Circuit "held * * * that it had not been established that discovery was unnecessary." Br. in Opp. 9. In fact, the court of appeals merely observed that "contrary to the implication in appellants' briefs, *the government never agreed* that the case would be decided on the basis of the facts alleged in the forfeiture petition, or that discovery was unnecessary." Pet. App. 3a (emphasis added). We are aware of no rule of law — and the government cites to none — that entitles a party to take discovery on allegations whose truth the opposing party is willing to accept.

court considered petitioners' Eighth Amendment claims (which, at the government's request, it did not), the government would have sought to depose Mr. Portillo on issues related to those claims. See Br. in Opp. 12 n.3. That argument is misplaced for at least two reasons. Perhaps most importantly, the district court (*accepting the government's arguments below*) declined to consider petitioners' Eighth Amendment claim, not because it concluded that Mr. Portillo's failure to be deposed could be viewed as an admission of any factual allegations relevant to the Eighth Amendment claim — the district court refused to entertain any argument on the Eighth Amendment claim at all — but rather solely to punish him for not returning for a deposition that would have explored issues raised by the government's statutory forfeiture claim. See, *e.g.*, Pl. Mem. in Opp. to Claimant's Mot. for Sum. Judg. 5. Had the district court properly understood Rule 37's prohibition on such sanctions, it likely would have reached a different result.

But even if the district court had based its ruling on the government's theory here — that petitioners' assertion of their Eighth Amendment rights entitles the government to discovery on factual allegations not raised in any of the pleadings — the dismissal of petitioners' claims still would be wrong. That is because the government's theory rests on the mistaken assumption that the government, in defending against an Eighth Amendment challenge to a civil forfeiture of property based on a structured transaction, is entitled to probe all manner of "crimes" that are not mentioned in the complaint and that do not form the basis for the forfeiture complaint. The government cites no authority for that novel proposition, and we are aware of none. Indeed, the Ninth Circuit's leading case on applying the Eighth Amendment's excessiveness limitation to civil forfeiture actions strongly suggests (contrary to the government's unsubstantiated claim) that the "culpability" prong of its excessiveness test is limited to the claimants' culpability regarding the crime charged in the complaint. See *United States* v. *Real Property Located in El Dorado County*, 59 F.3d 974, 986 (9th Cir. 1995). Here, petitioners *offered to admit* to the only basis alleged in the forfeiture complaint for the forfeiture of property sought by the government — the structuring transactions. They sought only to challenge the

magnitude of the forfeitures as excessive in relation to the violations on which they were expressly based. Once the allegations of the government's complaint were admitted, there was no need for further discovery concerning "the culpability of the owner" or the "depth of petitioners' involvement in criminal activity" (Br. in Opp. 12 n.3).[3]

Finally, it bears repeating that the Eighth Amendment claim in this case is hardly insubstantial. The government sought to forfeit $2.6 million of petitioners' property because $159,000 of the money used to purchase that property was traceable to money involved in an illegally structured transaction. We submit that the excessiveness of a $2.6 million forfeiture in relation to these structuring offenses is a purely legal issue that should be resolved in petitioners' favor.

4. The government unsuccessfully seeks to explain away the various conflicts identified in our petition (at 12-15) between the opinion below and various decisions of other courts of appeals. See Br. in Opp. 10-14. To begin with, although the government correctly reports that *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988), relied in part upon the absence of a showing of willfulness in overturning a district court's dismissal of an absent party's claim in a forfeiture action, the First Circuit was clear in stating that the absence of willfulness was but one factor in its decision. The court's refusal to uphold a dismissal order also rested upon (1) the government's failure to point to any relevant facts it could have obtained from the claimant's deposition, and (2) the district court's ability to protect the government against any prejudice it would have suffered (if there had been facts that the claimant's deposition would have provided) simply by considering those facts resolved in the government's favor. *Id.* at 642-643. It is this aspect of *Pole No. 3172* that is incompatible with the Ninth Circuit's refusal here both to require the government to demonstrate that it suffered some prejudice from

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[3] In any event, it is worth emphasizing, even if factual allegations outside of the pleadings were relevant to the excessive fine issue, Portillo's failure to be deposed at most would have entitled the government to *a finding that those allegations were true* — not to an ultimate legal determination that the fine was not excessive.

the absence of Portillo's deposition and to attempt to craft a less drastic remedy in case such prejudice existed (which it did not).

Similarly unavailing is the government's attempt to distinguish *Fonseca* v. *Regan*, 734 F.2d 944 (2d Cir.), cert. denied, 469 U.S. 882 (1984), and *Harris* v. *City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995). The government argues (Br. in Opp. 11-13) that *Fonseca* and *Harris* differ from this case because the Second and Third Circuits concluded that the discovery sought was either irrelevant or not sufficiently related to the legal claims at issue, whereas the court below reached a contrary conclusion. We agree wholeheartedly with the government's descriptions of *Fonseca* and *Harris*, but not with its reading of the decision below. The sum total of the Ninth Circuit's statement on the topic was as follows: "The government was entitled to determine the underlying facts in order to make its case, and, contrary to the implication in appellants' briefs, the government never agreed that the case would be decided on the basis of the facts alleged in the forfeiture petition, or that discovery was unnecessary." Pet. App. 3a. In other words, the Ninth Circuit apparently believed both (1) that the government had a right to discovery regardless of whether any factual disputes existed between the parties, and (2) that the district court could sanction petitioners for failing to honor that alleged right even where the government failed to show how the discovery sought had any relation to the legal issues remaining in the case. That analysis — entitling the government to discovery (and to a dispositive *sanction* for failure to provide such discovery) without requiring a showing that the discovery related to any legal issue left in the case — plainly conflicts with both *Fonseca* and *Harris*, as well as with this Court's unbroken line of decisions on this issue.

Finally, the government erroneously dismisses (Br. in Opp. 13-14) our showing that the decision below conflicts with the demand of other circuits that district courts consider less drastic alternatives to dismissal prior to implementing that draconian sanction. See, *e.g.*, *Matter of MacMeekin*, 722 F.2d 32, 34-36 (3d Cir. 1983). True, the Ninth Circuit paid lip service to the need to consider less drastic alternatives. But it apparently understood that requirement to mean nothing more than what the government's brief asserts it means: that a party be given more than one

opportunity to comply with a discovery order before it can be punished for a failure to comply. See Br. in Opp. 13 ("The court below simply concluded, in the face of Portillo's willful disobedience of the district court's discovery orders, that no sanction short of a default judgment would be sufficient in this case."). But this Court's repeated admonitions against imposing the sanction of dismissal "'as a mere punishment'" for a party's refusal to comply with a discovery order (*Societe Internationale*, 357 U.S. at 210, quoting *Hammond Packing*, 212 U.S. at 350) make clear that both the government and the court below misapprehend the requirement to consider alternatives. Instead, that requirement mandates that the district court determine whether alternatives *to the unavailable discovery* — like, for example, resolving disputed facts in favor of the party demanding the discovery — would prevent the party seeking discovery from being prejudiced by the absence of the discovery. See, *e.g.*, *Pole No. 3172*, 852 F.2d at 642. It was the Ninth Circuit's failure to demand the consideration of such alternatives that conflicts with the decisions of this and other courts.

In short, neither the government nor the decision below identified a single disputed material factual issue that Mr. Portillo's deposition was needed to resolve. Under those circumstances, the dismissal of petitioners' claims as a sanction for Mr. Portillo's failure to be deposed violated Rule 37 and the Due Process Clause.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be summarily reversed, or at least vacated and remanded for reconsideration in light of the Court's decision in *Degen*.

Respectfully submitted.

LAWRENCE S. ROBBINS
Counsel of Record
ALAN E. UNTEREINER
LAURIE R. RUBENSTEIN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

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